IN THE SUPREME COURT OF THE STATE OF ALASKA

Golden Heart Utilities, Inc. and College Utilities Corporation,
Appellants,

v.

Regulatory Commission of Alaska; Office of the Attorney General, Regulatory Affairs & Public Advocacy Section; Greater Fairbanks Community Hospital Foundation, Inc.; Foundation Health, LLC; JL Properties, Inc.; Fountainhead Development, Inc.; Timmons & Larson, Inc.; MV Investments LLC; Alaska Espresso Distributors, LLC d/b/a Sunrise Bagel & Espresso; Pacific Rim Associates I, Inc. d/b/a Clarion Hotel & Suites; H2O 2U LLC d/b/a Water Wagon; and University of Alaska Fairbanks;
Appellees.

Supreme Court No. S-18624
Trial Court Case No. 3AN-21-06152CI

APPEAL FROM THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT AT ANCHORAGE, THE HONORABLE ANDREW GUIDI, JUDGE

BRIEF OF APPELLEE STATE OF ALASKA DEPARTMENT OF LAW REGULATORY AFFAIRS AND PUBLIC ADVOCACY SECTION

Filed in the Supreme Court of the State of Alaska on October 17, 2023

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ALASKA STATUES

AS 44.23.020(e). Duties; and powers; waiver of immunity.
(e) There is established within the Department of Law the function of public advocacy for regulatory affairs. The attorney general shall participate as a party in a matter that comes before the Regulatory Commission of Alaska when the attorney general determines that participation is in the public interest. When considering whether participation is in the public interest, the attorney general shall consider the issues the Regulatory Commission of Alaska must take into consideration under AS 42.05.141(d).

AS 42.05.141. General powers and duties of the commission.
(a) The Regulatory Commission of Alaska may do all things necessary or proper to carry out the purposes and exercise the powers expressly granted or reasonably implied in this chapter, including

(1) regulate every public utility engaged or proposing to engage in a utility business inside the state, except to the extent exempted by AS 42.05.711;

(2) investigate, upon complaint or upon its own motion, the rates, classifications, rules, regulations, practices, services, and facilities of a public utility and hold hearings on them;

(3) make or require just, fair, and reasonable rates, classifications, regulations, practices, services, and facilities for a public utility;

(4) prescribe the system of accounts and regulate the service and safety of operations of a public utility;

(5) require a public utility to file reports and other information and data;

(6) appear personally or by counsel and represent the interests and welfare of the state in all matters and proceedings involving a public utility pending before an officer, department, board, commission, or court of the state or of another state or the United States and to intervene in, protest, resist, or advocate the granting, denial, or modification of any petition, application, complaint, or other proceeding;

(7) examine witnesses and offer evidence in any proceeding affecting the state and initiate or participate in judicial proceedings to the extent necessary to protect and promote the interests of the state.

(b) The commission shall perform the duties assigned to it under AS 42.45.100 – 42.45.190.

(c) In the establishment of electric service rates under this chapter the commission shall promote the conservation of resources used in the generation of electric energy.

(d) When considering whether the approval of a rate or a gas supply contract proposed by a utility to provide a reliable supply of gas for a reasonable price is in the public interest, the commission shall

(1) recognize the public benefits of allowing a utility to negotiate different pricing mechanisms with different gas suppliers and to maintain a diversified portfolio of gas supply contracts to protect customers from the risks of inadequate supply or excessive cost that may arise from a single pricing mechanism; and

(2) consider whether a utility could meet its responsibility to the public in a timely manner and without undue risk to the public if the commission fails to approve a rate or a gas supply contract proposed by the utility.

(e) The commission may not designate a local exchange carrier or long distance telephone company as the carrier of last resort. In this subsection, "local exchange carrier" and "long distance telephone company" have the meanings given in AS 42.05.890.

(f) The commission may designate an eligible telecommunications carrier consistent with 47 U.S.C. 214(e).

AS 42.05.191. Contents and service of orders.
Every formal order of the commission shall be based upon the facts of record. However, the commission may, without a hearing, issue an order approving any settlement supported by all the parties of record in a proceeding, including a compromise settlement. Every order entered pursuant to a hearing must state the commission's findings, the basis of its findings and conclusions, together with its decision. These orders shall be entered of record and a copy of them shall be served on all parties of record in the proceeding.

AS 42.05.301. Discrimination in service.
Except as provided in AS 42.05.306, a public utility may not, as to service, make or grant an unreasonable preference or advantage to any person or subject any person to an unreasonable prejudice or disadvantage. A public utility may not establish or maintain or provide an unreasonable difference as to service, either as between localities or as between classes of service, but nothing in this section prohibits the establishment of reasonable classifications of service or requires unreasonable investment in facilities.

AS 42.05.381(a). Rates to be just and reasonable.
(a) All rates demanded or received by a public utility, or by any two or more public utilities jointly, for a service furnished or to be furnished shall be just and reasonable; however, a

rate may not include an allowance for costs of political contributions, or public relations except for reasonable amounts spent for

(1) energy conservation efforts;

(2) public information designed to promote more efficient use of the utility's facilities or services or to protect the physical plant of the utility;

(3) informing shareholders and members of a cooperative of meetings of the utility and encouraging attendance; or

(4) emergency situations to the extent and under the circumstances authorized by the commission for good cause shown.

AS 42.05.391. Discrimination in rates.
(a) Except as provided in AS 42.05.306, a public utility may not, as to rates, grant an unreasonable preference or advantage to any of its customers or subject a customer to an unreasonable prejudice or disadvantage. A public utility may not establish or maintain an unreasonable difference as to rates, either as between localities or between classes of service. A municipally owned utility may offer uniform or identical rates for a public utility service to customers located in different areas within its certificated service area who receive the same class of service. Any uniform or identical rate shall, upon complaint, be subject to review by the commission and may be set aside if shown to be unreasonable.

(b) A rate charged by a municipality for a public utility service furnished beyond its corporate limits is not considered unjustly discriminatory solely because a different rate is charged for a similar service within its corporate limits.

(c) A public utility may not directly or indirectly refund, rebate or remit in any manner, or by any device, any portion of the rates and charges or charge, demand, or receive a greater or lesser compensation for its services than is specified in its effective tariff. A public utility may not extend to any customer any form of contract, agreement, inducement, privilege, or facility, or apply any rule, regulation, or condition of service except such as are extended or applied to all customers under like circumstances. A public utility may not offer or pay any compensation or consideration or furnish any equipment to secure the installation or adoption of the use of utility service unless it conforms to a tariff approved by the commission, and the compensation, consideration, or equipment is offered to all persons in the same classification using or applying for the public utility service; in determining the reasonableness of such a tariff filed by a public utility the commission shall consider, among other things, evidence of consideration or compensation paid by a competitor, regulated or nonregulated, of the public utility to secure the installation or adoption of the use of the competitor's service.

(d) Nothing in this section prevents a public utility from charging reduced rates to customers transferred to it from a competing utility provided the reduction is an integral part of a contract, arrangement, or plan to eliminate the overlapping of service areas or to minimize duplication of facilities and competition between public utilities.

AS 42.05.421(a). Suspension of tariff filing.
(a) When a tariff filing is made containing a new or revised rate, classification, rule, regulation, practice, or condition of service the commission may, either upon written complaint or upon its own motion, after reasonable notice, conduct a hearing to determine the reasonableness and propriety of the filing. Pending the hearing the commission may, by order stating the reasons for its action, suspend the operation of the tariff filing. For a tariff filing that does not change the utility's revenue requirement or rate design, the suspension may last for a period not longer than six months beyond the effective date established in the tariff filing unless the commission extends the period for good cause. For a tariff filing that changes the utility's revenue requirement or rate design, the suspension may last, unless the commission extends the period for good cause, for a period not longer than

(1) six months before an interim rate equal to the requested rate goes into effect and not longer than 12 months before a permanent rate goes into effect if the annual gross revenues of the utility making the filing are more than $3,000,000; and

(2) 150 days before an interim rate equal to the requested new rate goes into effect and not longer than one year before a permanent rate goes into effect if the annual gross revenues of the utility making the filing are $3,000,000 or less.

AS 42.05.421(c). Suspension of tariff filing.
(c) In the case of a proposed increased rate, the commission may by order require the interested public utility or utilities to place in escrow in a financial institution approved by the commission and keep accurate account of all amounts received by reason of the increase, specifying by whom and in whose behalf the amounts are paid. Upon completion of the hearing and decision the commission may by order require the public utility to refund to the persons in whose behalf the amounts were paid, that portion of the increased rates which was found to be unreasonable or unlawful. Funds may not be released from escrow without the commission's prior written consent and the escrow agent shall be so instructed by the utility, in writing, with a copy to the commission. The utility may, at its expense, substitute a bond in lieu of the escrow requirement.

AS 42.05.421(d). Suspension of tariff filing.
(d) One who initiates a change in existing tariffs shall bear the burden to prove the reasonableness of the change.

AS 42.05.441(b). Valuation of property of a public utility.
(b) In determining the value for rate-making purposes of public utility property used and useful in rendering service to the public, the commission shall be guided by acquisition cost or, if lower, the original cost of the property to the person first devoting it to public service, less accrued depreciation, plus materials and supplies and a reasonable allowance for cash working capital when required.

AS 45.45.010(a). Legal rate of interest; prepayment of interest.
(a) The rate of interest in the state is 10.5 percent a year and no more on money after it is due except as provided in (b) of this section.

ALASKA REGULATIONS

3 AAC 48.275(a)(9). Supporting information.
(a) Except as provided in (b) of this section, each filing with the commission of a permanent or interim tariff revision that involves a change in rates to the customers of a utility or shippers of a pipeline carrier must include the following supporting information in the following order:

(9) a schedule showing the computation of rate base using a 13-month average (the arithmetic sum of the beginning of each month net balance for the 12-month test period, plus the balance at the end of the twelfth month of the test period, divided by 13) of all rate-base components except cash working capital allowance, and using any other rate-base theory the utility or pipeline carrier considers appropriate and supportable;

3 AAC 48.820(41). Definitions.
Unless the context indicates otherwise, in this chapter

(41) "test year" means any 12 consecutive months of operating data selected to evaluate revenue requirements or cost of service; the period selected must be at least as recent as the utility's or pipeline carrier's latest calendar or fiscal year;

3 AAC 48.820(42). Definitions.
Unless the context indicates otherwise, in this chapter

(42) "normalized test-year" means a historical test-year adjusted to reflect the effect of known and measurable changes and to delete or average the effect of unusual or nonrecurring events, for the purpose of determining a test year which is representative of normal operations in the immediate future;

I. STATEMENT OF ISSUES

1. Did the Regulatory Commission of Alaska (RCA) abuse its discretion in determining a just and reasonable return on equity?

2. Did the RCA abuse its discretion in denying an adjustment to rate base to treat post-test year and late-test year plant additions as if they had been in service during the entire test year?

3. Did the RCA abuse its discretion when it denied Appellant's request for a consumption adjustment?

4. Did the RCA abuse its discretion when it required Golden Heart Utilities, Inc., and College Utilities Corporation (collectively GHU/CUC) to place interim rates in escrow or pay 10.5 percent interest on any refunds due?

II. STATEMENT OF THE CASE

A. Introduction

The Office of the Attorney General, Regulatory Affairs & Public Advocacy Section (RAPA) represents the public interest in matters before the Regulatory Commission of Alaska (RCA) and participated in this case below.[1] Alaska statute requires RAPA to participate in matters before the RCA when the attorney general determines that participation is in the public interest.[2] RAPA files this brief in support of the public interest in this case. The Appellants, GHU/CUC, appeal the Superior Court's decision in

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1 AS 44.23.020(e).

2 *Id.*

Case No. 3AN-21-061521CI to uphold orders of the RCA related to GHU/CUC's four consolidated general rates cases in Dockets U-19-070/U-19-071/U-19-087/U-19-088. GHU/CUC appeals four parts of the RCA's decision below: 1) a just and reasonable return on equity (ROE), 2) the exclusion of late and post test-year plant from the calculation of rate base, 3) the denial of a consumption adjustment proposed by GHU/CUC to decrease the actual water and wastewater consumption amounts included in the calculation of its revenue requirement, and 4) the requirement that GHU/CUC either place revenue received from interim rate increases into escrow or pay interest at 10.5 percent on refunds.

In GHU/CUC's Opening Brief (Brief), it mostly repeats the same arguments made below. GHU/CUC argues that the RCA lacked a reasonable basis for the determinations it appeals. This argument seems to acknowledge that the deferential reasonable basis standard applies to the RCA's determination in this case.[3] However, a review of GHU/CUC's arguments reveals an attempt to evade the reasonable basis standard and apply a more exacting one. GHU/CUC asks this Court to look past the deference due the RCA, reweigh the evidence, and reach a different conclusion regarding the issues it appeals. As RAPA will discuss, this is not a proper application of the deferential reasonable basis standard.

GHU/CUC repeats its argument from below that the RCA "improperly deviated" from its own prior rulings. GHU/CUC misapplies the judicial concept of administrative

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[3] GHU/CUC never explicitly states the standard of review that it believes applies in the "Standard of Review" Section of its Brief. See Brief at 3-4. However, its frequent reference to "reasonable basis" seems to accept that the reasonable basis standard applies.

stare decisis. GHU/CUC's *stare decisis* argument ignores the broad discretion inherent in the RCA's powers to ensure just and reasonable utility rates for Alaska ratepayers based on the facts of each unique utility rate case that comes before the RCA.[4]

GHU/CUC also asserts that the RCA's rate decisions, both singularly and cumulatively, amount to an unconstitutional taking of its property. GHU/CUC points to the "substantial decrease," 7 percent, to its revenue requirement caused by the RCA's decisions. Brief at 47. However, aside from bare assertions, GHU/CUC fails to establish that any of the RCA's decisions, either on their own or cumulatively, amount to an unconstitutional taking under applicable United States and Alaska Supreme Court precedent.

This brief begins with a review of important ratemaking principles applicable to this appeal. It will then discuss the standard of review that applies and then generally analyze GHU/CUC's *stare decisis* and constitutional takings claims. Finally, it will address each individual rate case issue appealed by GHU/CUC.

B. Ratemaking Background

The briefs submitted by all parties to the Superior Court below provide detailed descriptions of the rate-making process. RAPA will not repeat this description here. However, there are a few particular areas and principles applicable to ratemaking cases that RAPA emphasizes to this Court.

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4 *See* AS 42.05.141.

1. Rates are not Set to Guarantee a Return.

Alaska law charges the RCA with ensuring that rates charged by a public utility are just and reasonable.[5] Accordingly, the RCA can, and often does, suspend a rate case filing for further investigation to determine if the utility's proposed rates are just and reasonable.[6] When the RCA investigates a rate case, it looks at the revenue requirement proposed by the utility to determine if its various components are just and reasonable. The revenue requirement is the total revenue the utility is authorized to collect through its rates and is designed to include prudent utility costs, a fair return on invested capital, depreciation expense, and income taxes. [Exc. 967-968].

In Alaska, the utility's revenue requirement is typically determined based on the costs incurred during a historic test year – a 12-month period that is expected to be representative of costs going forward.[7] The historic test year allows comparison of a defined period's total costs, including operating expenses, with its total revenues from rates paid by the utility's customers. The historic test year approach begins with actual revenues and sales of a recent year and sets rates based on "adjustments for known and measurable changes"—also called pro forma adjustments.[8] Pro forma adjustments adjust test year data

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5 AS 42.05.381(a).

6 AS 42.05.421(a).

7 The RCA has defined "test year" as "any 12 consecutive months of operating data selected to evaluate revenue requirements or cost of service; the period selected must be at least as recent as the utility's or pipeline carrier's latest calendar or fiscal year." 3 AAC 48.820(41).

8 Phillips, Charles F. Jr, *The Regulation of Public Utilities* at p. 196, (3rd ed. 1993).

to reflect known and measurable changes in expense levels and other ratemaking elements that will occur during or at the end of the test year. This is known as a normalized test year.[9]

The determination of a reasonable return to be included in a utility's revenue requirement is the most controversial issue in most rate cases. The return used in determining the revenue requirement consists of the weighted average cost of debt and equity components in a utility's capital structure.[10] The return is applied to a utility's rate base to calculate a total amount in the revenue requirement to compensate investors for their contributed capital.[11] Due to the inherent inaccuracies of using a normalized test year to predict costs going forward, a utility will seldom earn the exact return included in its final, authorized revenue requirement. Courts elsewhere have noted this means utilities may recover more or less than their authorized return without any recompense for the utility

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9 The RCA defines "normalized test-year" as "a historical test-year adjusted to reflect the effect of known and measurable changes and to delete or average the effect of unusual or nonrecurring events, for the purpose of determining a test year which is representative of normal operations in the immediate future." 3 AAC 48.820(42).

10 *Amerada Hess Pipeline Corp. v. Regul. Comm'n of Alaska*, 176 P.3d 667, 677 (Alaska 2008).

11 *Id.*

or ratepayers.[12]

2. Utilities Seeking to Raise Rates Bear the Burden of Establishing that the Proposed Rates are just and reasonable.

A utility seeking a change in rates bears the burden of establishing the reasonableness of the rates sought.[13] Therefore, a utility filing a rate case bears the burden of establishing that its revised rates are just and reasonable. AS 42.05.421(a) directs the RCA to determine the reasonableness and the propriety of "the filing." Determining the reasonableness and propriety of an entire rate revision filing requires that the RCA not just consider the individual elements included in each filing, but how the elements interrelate and operate together. As such, in proceedings before the RCA, utilities bear the burden of establishing that all aspects of their revised tariffs operate together to produce just and reasonable rates.

III. STANDARD OF REVIEW

When the superior court acts as an intermediate court of appeal in an administrative matter, this Court independently reviews the RCA's decisions "without giving deference

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[12] "A utility is entitled only to the opportunity to earn a reasonable return on investment; the law does not insure that it will in fact earn the particular rate of return authorized by the Commission *or indeed that it will earn any net revenues*." *South Cent. Bell Telephone v. Louisiana Public Service Com'n,* 594 So.2d 357, 359-360 (Louisiana 1992), citing *Southern California Edison Co. v. Public Utilities Comm'n,* 576 P.2d 945, n.8 (CA 1978) [emphasis added]; "[I]f the utility's profits turn out to be higher than had been forecast by the Commission in setting the rates, the law does not penalize the Company for its efficiency by requiring a divestiture of unanticipated earnings." *South Cent. Bell Telephone v. Louisiana Public Service Com'n,* 594 So.2d 357, 360 (Louisiana 1992), citing *In re Petition of Elizabethtown Water Co.*, 107 N.J. 440, 527 A.2d 354 (NJ 1987).

[13] AS 42.05.421(d).

to the superior court's decision."[14] The Alaska Supreme Court provided a comprehensive review of the standard of review applicable in appeals from RCA rulings in *Amerada Hess.*[15] The court reviews factual findings made by the RCA under a "substantial evidence" standard upholding the findings if supported by "relevant evidence that a reasonable person might accept as adequate to support them."[16] In regards to questions of law that do no implicate the RCA's special expertise, "the court substitutes its own judgment." Where "the [RCA] employs specialized expertise in a legal determination, the court applies a rational basis standard; [the RCA's] interpretation prevails over the court's, so long as [the RCA] is reasonable."[17]

The Alaska Supreme Court later expanded on the deferential reasonable basis test it applies to RCA decisions in *Alpine Energy, LLC v. Matanuska Elec. Ass'n*:[18] "Under the deferential 'reasonable basis' test, we consider whether the agency's decision was 'arbitrary, capricious, or unreasonable,' and whether the agency [took] a hard look at the salient problems...and genuinely engaged in reasoned decision making."[19]

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14 *Municipality of Anchorage v. RCA*, 215 P.3d 327, 330 (Alaska (2009) (quoting *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1231 (Alaska 2003) (citing *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000); *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987)).

15 176 P.3d 667, 673 (Alaska 2008).

16 *Id.*

17 *Id.*

18 369 P.3d 245 (Alaska 2016).

19 *Id.* at 251 (internal citations omitted, modification in original).

Courts in other jurisdictions "have long recognized that ratemaking is 'much less a science than an art,' requiring 'both technical understanding and policy judgment.'"[20] This is why "great deference" is given to the regulatory agency's expertise and judgment on the reasonableness of the authorized rate.[21] Courts do not disturb the agency's ratemaking decisions so long as the rate is within a zone of reasonableness "even if not in the court's judgment, the 'ideal' design[.]"[22]

GHU/CUC does not identify any factual issues in dispute in this appeal. Instead, the issues it appeals, with the exception of the conditions placed on GHU/CUC's collection of interim rates, involve the RCA's weighing of expert witness recommendations and opinions as applied to various ratemaking principles. These determinations fall squarely within the deferential reasonable basis standard and should not be disturbed so long as they produce rates within the zone of reasonableness.

IV. ARGUMENT

A. Summary of Arguments.

GHU/CUC builds its appeal around two core assertions that apply to most of the issues it appeals. First, it asserts that the RCA ignored its own prior rulings and failed to provide an adequate explanation for the departure. Second, GHU/CUC asserts that the RCA's decisions on their own, and cumulatively result in an unconstitutional taking of its

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20 *Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission*, 45 F.4th 265, 286 (D.C. Cir. 2022) (quoting *Ala. Elec. Coop., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982).

21 *Alabama Elec. Co-op., Inc. v. F.E.R.C.*, 684 F.2d 20, 27 (D.C. Cir. 1982).

22 *Id.*

property. GHU/CUC repeats these assertions throughout its Brief. Accordingly, RAPA's argument begins by discussing why, generally, these assertions fail before responding individually to them as they apply to each issue.

1. Administrative *Stare Decisis* Does not Apply.

GHU/CUC asserts that the RCA improperly deviated from prior precedent and failed to explain its departure when arriving at its determinations in this case. Brief at 4-5. In doing so, GHU/CUC cites a series of federal and state rulings discussing the concept of administrative *stare decisis* that hold that administrative agencies act improperly when they overrule a prior decision without adequately explaining their departure from the prior ruling. Brief at 4-5. But, this common law principle requires the tribunal "to follow precedent when [the] *same points* again arise."[23] RAPA does not believe administrative *stare decisis* applies to the RCA to the extent argued by GHU/CUC. But even if it does, GHU/CUC overstates its breadth by both reading RCA decisions to stand for rules not explicitly stated by the RCA and by seeking to apply factually distinguishable cases with entirely different records, arguments, and policy considerations as binding precedent on the RCA.[24]

GHU/CUC cites *Amerada Hess* for its belief that administrative *stare decisis* applies to the RCA's decisions. [25] However, far from settling the issue of whether *stare decisis* can

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[23] *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 494 n. 148 (Alaska 2020) citing Black's Law Dictionary (11th ed. 2019) (emphasis added).

[24] A prior ruling cannot create binding precedent "if its holding is only implicit or assumed." Joseph v. State, 26 P.3d 459, 468 (Alaska 2001).

[25] 176 P.3d 667 (Alaska 2008).

ever apply to prior rate case rulings, the Court's decision in *Amerada Hess* demonstrates how ill-suited issues in rate cases are to this doctrine.

In *Amerada Hess*, the Court's discussion of agency precedent surrounded two issues. First was whether the RCA departed from precedent by employing accelerated rather than straight-line depreciation.[26] The second issue was whether the RCA departed from precedent when it expanded beyond its past reliance on a discounted cash flow methodology for determining the appropriate rate of return on equity.[27]

The Court did not find an unreasonable or unexplained departure from precedent in either instance. In regards to depreciation, the appellant carriers argued that the RCA misinterpreted two APUC decisions that ordered straight-line depreciation.[28] Faced with a "cold and indeterminate" record in one of the prior cases, the Court found no basis to disagree with the RCA's seemingly reasonable interpretation of the APUC decisions, noting that the RCA "is entitled to deference based on agency expertise in interpreting the rate-making decisions of predecessor regulatory entities."[29] Additionally, the Court found "[e]ven if RCA could be shown to have misread these cases, it is free to fashion an improved procedure for midstream rate-base determinations as long as such is not

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26 *Id.* at 678.

27 *Id.* at 685.

28 *Id.* at 679.

29 *Id.*

unreasonable and arbitrary."[30] This Court rejected the carriers' argument that the RCA was bound by the prior decision on depreciation.

The Court also rejected the carriers' claim that the RCA's decision setting the cost of capital was an inappropriate departure from precedent. The Court found that the RCA "adequately explained" the basis for its decision where the RCA relied on the testimony of the expert witness it found most credible regarding investors' reliance on a wide spectrum of information.[31] The Court found that the RCA's rate of return analysis revealed a "thoughtful, conscientious, and discursive" decision-making process in a technical area involving competing theoretical models.[32] Therefore, the Court found the RCA "had a reasonable rather than an arbitrary basis, supported by the record, for its approach" and that as a reviewing court, it was "not entitled to probe further."[33]

This Court's discussion in *Amerada Hess* leaves open the possibility that the RCA could act unreasonably by failing to follow or acknowledge its precedent. However, it equally calls into question whether the doctrine of *stare decisis* can ever practically apply in rate case adjudications due to the dynamic nature of ratemaking.

Beyond *Amerada Hess*, RAPA is unaware of any case law in Alaska discussing or applying *stare decisis* to rate case adjudications. At least one other state supreme court explicitly found that prior decisions of a utility regulatory agency "are not entitled to either

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30 *Id.* at 679. (Emphasis added).

31 *Id.* at 685.

32 *Id.*

33 *Id.*

res judicata or stare decisis effect."[34] This makes sense considering the complex nature of the ratemaking process.

Each rate case before the RCA involves a complex set of facts, competing theories, and principles to determine just and reasonable rates. These adjudications do not lend themselves well to claims of administrative *stare decisis*. Rate cases seldom, if ever, present the RCA with the same or similar facts, testimony, or theories about issues like the cost of capital at a given time, what should be included in a utility's rate base, and ultimately in the utility's revenue requirement. Ensuring just and reasonable rates requires the RCA base its decision on the record before it without being constrained to former rulings based on an entirely different record.

2. GHU/CUC Fails to Demonstrate that the Rates Established by the RCA were Confiscatory.

GHU/CUC asserts the various decisions of the RCA that impacted its revenue requirement, both individually and collectively, resulted in confiscatory rates. Brief at 5, 46-48. GHU/CUC relies on two seminal United State Supreme Court cases to support this proposition, *Bluefield Water Works & Improvement Co. v. Public Service Comm'n of the State of West Virginia*[35] and *Federal Power Com'n v. Hope Natural Gas Co.*[36]

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34 *State of North Carolina ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc.*, 348 N.C. 452, 472, 500 S.E.2d 693, 706 (N.C. 1998) (quoting *State ex rel. Util. Comm'n v. Carolina Power & Light Co.*, 250 N.C. 421, 430, 109 S.E.2d 253 (NC 1959)).

35 262 U.S. 679 (1923).

36 320 U.S. 591 (1944).

Bluefield holds that rates that are insufficient "to yield a reasonable return on the value of property used at the time it is being used to render the service are unjust, unreasonable, and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."[37] *Hope* holds "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[38] GHU/CUC correctly identifies these cases as United States Supreme Court precedent applicable in utility ratemaking. However, GHU/CUC seems to ignore pertinent holdings from these cases as well as subsequent United States Supreme Court and Alaska Supreme Court cases that flesh out the practical application of these principles.

In deciding *Hope*, the United States Supreme Court was not blind to the practical challenges of applying its holdings in complex rate cases. It explicitly reserved a broad scope of discretion for regulatory commissions by limiting the appropriate scope of judicial review:

> We held . . . that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate making function, moreover, involves the making of 'pragmatic adjustments' . . . And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. *Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling.*[39]

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37 *Id.* at 690.

38 *Hope* at 320 U.S. at 603.

39 *Hope*, 320 at 602 (emphasis added).

As mentioned, Alaska statute charges the RCA with setting "just and reasonable" rates.[40] The United States Supreme Court later held that a rate that falls within a zone of reasonableness, where the rate is neither confiscatory at one end nor excessive at the other, is just and reasonable.[41] This Court recognized the "zone of reasonableness" principle in *U.S. v. RCA Alaska Communications*.[42]

The United States Supreme Court further defined the constitutional contours applicable to rate cases in *Duquesne Light Co. v. Barasch*:[43]

> The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utilities' property if they are compensated by countervailing factors in some other aspect.[44]

This Court examined and applied these U.S. Supreme Court cases in *Cook Inlet Pipeline Company v. Alaska Public Utilities Commission*.[45] The Court addressed Cook Inlet Pipeline's (Cook Inlet) claim that the Alaska Public Utility Commission's (APUC)[46]

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40 AS 42.05.381(a).

41 *Re Permian Basin Area Rate Cases,* 390 U.S. 747, 797-98 (1968).

42 597 P.2d 489, 511 (Alaska 1978).

43 488 U.S. 299 (1989).

44 *Id.* at 314.

45 836 P.2d 343 (Alaska 1992).

46 APUC was the predecessor to the RCA.

denial of a "transition rate base" and the substitution of the original cost methodology resulted in an unconstitutional taking of property. In rejecting Cook Inlet's takings claim, this Court cited to *Duquesne* and reiterated the holding that "[i]t is not the theory, but the impact of the rate order which counts."[47] This Court highlighted its prior holding that "the State of Alaska may regulate industry in a manner which has a detrimental economic effect on a business without causing a taking of property which requires compensation" and explained that a rate is only confiscatory if it threatens the financial integrity of the utility.[48] This Court also held that "[t]he 'rate base' is a theoretical construct from which rates are derived" and therefore "is not property."[49] As previously explained, the law does not guarantee that a utility will earn a particular return, or *any net revenues at* all.[50]

GHU/CUC's constitutional takings claim fails because it does not demonstrate that the RCA's collective decisions resulted in a rate so low as to threaten its financial integrity. GHU/CUC's bald assertion that the decrease to its revenue requirement caused by the RCA's decisions "does not serve to maintain [its] financial integrity, particularly in light of the declining consumption" is not enough. Brief at 48. It does not point to any evidence

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47 *Id.* at 349, *(citing Duquesne*, 488 U.S. at 314).

48 *Id.* at 349-350, (*citing Alaska, Dep't of Natural Resources v. Arctic Slope Regional Corp*, 834 P.2d 134 (Alaska 1991).

49 *Id.* at 350.

50 *South Cent. Bell Telephone Co. v. Louisiana Public Service Com'n*, 594 So.2d 357, 359-360 (Louisiana 1992) (citing *Southern California Edison Co. v. Public Utilities Comm'n*, 576 P.2d 945, n. 8 (CA 1978) (emphasis added)).

in the record or other information that supports this contention aside from the fact that the RCA's decision resulted in a lower revenue requirement than the utilities requested.

GHU/CUC points to its "achieved ROEs far below authorized levels" as support for its claims that the RCA's decisions resulted in confiscatory rates. Brief at 48. However, the "under recovery" of authorized ROEs does not meet the threshold required for demonstrating confiscatory rates under applicable case law.[51] As the Louisiana Supreme Court pointed on in *South Central Bell,* the risk of "under-recovering" an authorized ROE, or a revenue requirement in general, is always inherent in the rate making process.[52] An under-recovery may occur, so long as the under-recovery does not threaten the financial integrity of the utility. GHU/CUC's self-serving, bare assertions, that the RCA's decisions threaten its financial integrity are insufficient to establish that the final authorized rates are confiscatory.[53]

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51 *Cook Inlet,* 836 P.2d at 349-350. A holding that the failure to attain an authorized ROE results in an in an unconstitutional takings would severely disincentive utilities from operating efficiently. It would also encourage utilities to further inflate requested ROEs.

52 594 So.2d at 359-60.

53 As pointed out in the Superior Court's Order at 13, GHU/CUC appears to "advocate a more exacting standard of review" based upon *Permian Basin,* 390 U.S. 747 (1968) arguing that the court, in addition to its routine review, should look at whether the RCA's decisions on "essential elements" are supported by substantial evidence. However, as noted by Judge Guidi, GHU/CUC fails to identify the "essential elements" of the RCA's case that it is appealing "other than to say it is appealing essential elements." This does not provide a basis for a more exacting standard of review.

B. GHU/CUC Fails to Demonstrate that the RCA Acted Arbitrarily, Capriciously, or Unreasonably in Reaching its Return on Equity Determinations.

The RCA's ROE determinations represent the biggest issue in this case. It is important to review GHU/CUC's ROE argument in the overall context of the art of ratemaking. ROE determinations entail consideration of many different competing economic theories, models, and opinions. In this case, the RCA considered the competing theories, economic models, and opinions presented by both cost of capital expert witnesses and calculated a return on equity amount that fell in between the return recommended by both cost of capital experts and significantly above the average amount authorized by other state utility regulatory agencies in 2018, the test year.[54] As discussed below, GHU/CUC fails to establish any grounds for reversing and remanding the RCA ROE determinations.

1. The RCA did not Act Arbitrarily, Capriciously, or Unreasonably in Including the Market to Book ("M/B") Results in its Overall ROE Calculation.

GHU/CUC argues that the RCA lacked a reasonable basis for its ROE decision because it did not base its decision to require the use of M/B results in its ROE calculation on facts in the record. Brief at 6. GHU/CUC asserts that the RCA failed to sufficiently explain its findings and conclusions regarding inclusion of the M/B results thereby

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[54] *See* [Exc. 0686] for GHU/CUC's expert witness' corrected ROE recommendations of 11.56 percent and 11.59 percent for the water and wastewater utilities respectively. *See* [Exc. 0662] for RAPA's ROE recommendation of 10 percent for the utilities. *See* [Exc. 0845] for the Commission's final authorized ROEs of 10.53 percent and 10.56 percent for the water and wastewater utilities respectively. *See* [Exc. 961] showing an average authorized ROE for water utilities in 2018 of 9.41 percent.

"hampering a court's ability to conduct a meaningful judicial review of the reasonableness of those findings." Brief at 6. To support these assertions, GHU/CUC claims that the RCA reached its determination despite testimony from both experts that the M&B results should be excluded from the ROE calculation. More specifically, GHU/CUC claims that the RCA reached its decision to include Mr. Blessing's M/B analysis results "despite testimony from Mr. Blessing that the result of his M/B analysis is so far outside the range of the other analyses that it should be excluded as a statistical outlier." Brief at 7.

GHU/CUC's argument regarding this issue is best described as the position that, based on the facts in the record, excluding the M/B results in the return on equity calculation would be a better decision. However, the standard of review this Court applies is not whether it would reach a different conclusion faced with the same facts.[55] Instead, the Court considers whether, based on the record, the RCA's decision was arbitrary, capricious, or unreasonable.

In reaching its overall ROE determination, the RCA specifically referred to the lack of any convincing evidence in the record that questioned the merits of the methodology apart from the low results its corrected calculation yielded. [Exc. 0843]. The record contains no testimony from either expert that including the results of the M/B analysis in the overall

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[55] *See, e.g., Davis Wright Tremaine LLP v. State, Dept. of Administration,* 324 P.3d 293, 299 (Alaska 2014) (stating "[w]hen applying the reasonable basis test, we 'seek to determine whether the agency's decision is supported by the facts and has a reasonable basis in law, even if we may not agree with the agency's ultimate determination.'" (quoting *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987) (citing *Kelly v. Zamarello,* 486 P.2d 906, 918 (Alaska 1971)).

calculation of the ROE will result in an amount that falls below an amount considered a reasonable return by investors in similar enterprises. In fact, GHU/CUC's expert continued to include the results of this methodology in his reply testimony even after being informed of his error and realizing the significant downward adjustment its correction required. [Exc. 0686, 980, 982-983]. While GHU/CUC's expert said it would be better to remove the result, he did not do so.

In addition, by focusing solely on the impact of the M/B results to the overall ROE calculation, GHU/CUC misses the bigger picture. While its expert stated during the hearing that he "would have done what Mr. Parcell" did and exclude the CAPM analysis if he had realized his error, he did not amend or otherwise change the overall ROE recommendations included in his Prefiled Reply Testimony after learning of his mistake. Before factoring in a risk/size premium, GHU/CUC's expert ultimately recommended an ROE of 9.81 percent and 9.84 percent[56] respectively for the water and wastewater utilities before factoring in a size/risk premium in his reply testimony.[57] In Order 21, the RCA calculated an ROE of 9.78 percent and 9.81 percent for the water and wastewater utilities respectively before

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56 [Exc. 979] presenting a "Cost of Equity Before Additional Risk Premium of 9.81% for the water utilities"; [Exc. 980] presenting a "Cost of Equity Before Additional Risk Premium of 9.84% for the wastewater utilities."

57 In Appellant's Reply Brief in Superior Court, GHU/CUC took issue with RAPA's representation that GHU/CUC's expert recommended an ROE within the range ultimately used by the RCA because "[t]aking the proxy group average in Mr. Blessing's reply testimony and *excluding* the M/B approach, as is consistent with his oral testimony at hearing, produced ROEs of 10.75% and 10.79%[.]" Reply Brief at 31 (emphasis added). However, as addressed, completely absent from the record is any testimony from Mr. Blessing changing his overall ROE recommendation from the most recently recommended amount presented in his reply testimony.

factoring in the size/risk premium. [Exc. 0845]. In other words, the RCA calculated an ROE that fell within three basis of points of the ROEs recommended by GHU/CUC's own expert. *See* [Exc. 845, 979-980].[58] As held by the United States Supreme Court, when a utility challenges a rate order in court, "[u]nder the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling."[59] Here, setting aside the issue of a size/risk premium, irrespective of the method used by the RCA, its ROE calculation fell within a few basis points of the ROEs recommended by GHU/CUC's own expert. Therefore, GHU/CUC cannot argue that it was arbitrary, capricious, or unreasonable for the Commission to include the M/B result in its ROE determination.

a. The Commission Did Not Fail to Follow Precedent.

GHU/CUC repeats its administrative *stare decisis* argument in the context of the M/B result, asserting it should have been excluded as a statistical outlier. Brief at 8.

As addressed above, GHU/CUC misapplies administrative *stare decisis*. The application of this concept requires the existence of prior holdings involving the same points upon which a precedent can emerge. However, each return on equity determination involves consideration of complex competing economic models and theories. Each prior ruling relied on by GHU/CUC involved its own unique record at that specific time period

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58 As illustrated by Mr. Blessing's Prefiled Reply Testimony, by far the biggest difference between the cost of capital expert's ROE recommendations relates to the 175 basis point risk premium proposed by GHU/CUC's witness.

59 *Hope*, 320 U.S. at 602.

regarding these models and theories. GHU/CUC inappropriately relies on one aspect of the return on equity orders it cites while ignoring the differing facts and circumstances that influenced the RCA's decision.[60] Notably absent from any of the orders cited by GHU/CUC is the explicit ruling that any figure that could statistically be considered an outlier must be excluded from the return on equity calculation. Again, a ruling does not create binding precedent if its holding is only implicit or assumed.[61] Such a ruling would be inconsistent with the RCA's charge to base its decision on the record before it without undue regard for rulings in prior cases that involved entirely different records.[62] The principle of administrative *stare decisis* does not, and as a practical matter, cannot, require the RCA to address all of its prior decisions that may have involved a similar concept, such as statistical outliers, irrespective of the disparate facts, expert opinions, and arguments in the record.

b. The RCA did not Act Arbitrarily, Capriciously, or Unreasonably in Giving Equal Weight to the M/B Model in its Return on Equity Determination.

Without conceding that the M/B model results should be included in the overall ROE calculation, GHU/CUC next argues that at the very least, the M/B model results

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60 In its briefing before the Superior Court, RAPA analyzed every order cited by GHU/CUC as an example of a binding precedent requiring the exclusion of all figures that could be considered outliers in return on equity determinations. RAPA will not repeat this analysis here, but encourages the Court to refer to that briefing for an in-depth analysis of why each case presented by GHU/CUC does not create a binding precedent.

61 *See Joseph v. State*, 26 P.3d 459, 468 (Alaska 2001). The court also focused on whether the prior decisions "actually resolved the issue now before us." *Id.*

62 *See* AS 42.05.191 stating "[e]very formal order of the commission shall be based upon the facts of record."

should be given less weight than the other models. Brief at 12-15. GHU/CUC relies on the RCA's determination in Order U-07-76(8)/U-07-077(8) and Order U-08-157(10)/ U-08-158(10) to support this contention. GHU/CUC contends that these prior rulings created a binding precedent that the RCA must give lesser weight to any return on equity model that produces a certain unspecified degree of variance from other models.

GHU/CUC continues to misapply the concept of administrative *stare decisis*. Each RCA ruling GHU/CUC asserts the RCA failed to follow involved an entirely different record of facts, opinions, and countervailing considerations. Therefore, these prior rulings are incapable of creating a binding precedent the RCA failed to follow in this case.

A brief review of the rulings relied on by GHU/CUC demonstrates the fallacy of its position. In Dockets U-07-076/U-07-077 and U-08-157/U-08-158, the ROE recommended by the expert witnesses for both sides included only DCF and CAPM results.[63] Whereas in this case, GHU/CUC's recommendation included four separate models, and Mr. Parcell's recommendation included two different models.[64] In the ruling in Order U-07-076(8)/ U-07-077(8), the RCA gave extra weight to the DCF method because it "lend[ed] itself more readily to adjustment for the small size of GHU/CUC when compared to the data sets presented."[65] In this case there is no similar evidence in the record that the other models lend themselves more readily to adjustment for the small size of GHU/CUC. Contrary to

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63 Order U-07-076(8)/U-07-077(8) at 55-61. Available at https://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=92eb2edc-36e0-429e-8ad5-ba12ddfe9a49.

64 [Exc. 838, 839].

65 Order U-07-076(8)/U-07-077(8) at 64.

GHU/CUC's position, this case serves as the perfect of example of how the RCA exercises its discretion in each rate case based on the unique record of the case.

Turning to Order U-08-157(10)/U-08-158(10), the RCA gave less weight to the CAPM model than the DCF model noting, "both experts expressed preference for the DCF model" and pointed to testimony in the record explaining this preference.[66]

In this case, GHU/CUC's original ROE recommendation included M/B model results and GHU/CUC's expert did not provide an explanation for excluding the model apart from the low results it yielded. While the model ultimately yielded a significantly lower ROE than the other models, both expert witnesses testified that investors rely on multiple different analyses in developing their ROE expectations. [Exc. 930, 962]. Not surprisingly, a different record produced a different result, well within the RCA's broad ratemaking discretion.

Setting aside GHU/CUC's questionable legal position, it also presents perplexing practical problems. Pretending the rulings cited by GHU/CUC could rise to some sort of weighting precedent, their practical application seems highly evasive. Would weighting be required in subsequent cases despite convincing testimony and evidence regarding the superiority of the model producing variant results? What degree of variance requires weighting? What about cases that entail the presentation of multiple models producing highly variant results? There is no RCA precedent addressing these issues of application.

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66 Order U-08-157(10)/U-08-158(10) at 32. Available at https://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=fec104dc-a384-4259-a403-7c3e9173f447.

An equally troubling practical problem stems from GHU/CUC's position. If prior rulings involving entirely different records of facts and opinions can create binding precedent, how exactly is the RCA to ascertain its own precedent?

Considering the different theoretical underpinnings of the ROE methods utilized, and the varying opinions of experts from case-to-case, a significant difference in results cannot be characterized as unexpected. As emphasized above, it is the impact of the rate order, not the methodology used to determine the rate that determines the reasonableness of the RCA's rate order. Here, the RCA averaged the M/B results with three other results and landed on an ROE that fell within three basis points of the ROE recommended by GHU/CUC's own expert, excluding the risk premium. Therefore, GHU/CUC's claim that the RCA's decision to give the M/B results equal weight was arbitrary, unreasonable, or capricious is baseless.

c. The Commission's Representation of GHU/CUC's Statement Regarding the Accuracy of the M/B Results does not Render its Decision Arbitrary, Unreasonable, or Capricious.

GHU/CUC's next appeal point concerns the RCA's statement that "[l]ikewise, GHU and CUC stated that their 6.97% Market to Book recalculation was more accurate but asks to exclude it simply due to its outlier status." Brief at 16.[67] GHU/CUC complains that it attempted to "clarify the record" in it Petition for Reconsideration by stating "unequivocally that it does not consider Mr. Blessing's M/B results to be an accurate cost

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67 [Exc. 843-844].

of equity result" and that nonetheless, the RCA "was silent on this factual error" in its decision on reconsideration. Brief at 16.

GHU/CUC's witness described the M/B method as a "more elegant" method than another method that both experts included in their recommendation. [Exc. 981]. While RAPA acknowledges that "elegant" and "accurate" are not synonymous, GHU/CUC fails to explain how replacing the word "elegant" with "accurate" renders the RCA's inclusion of the M/B results arbitrary, capricious, or unreasonable. The RCA explained that the record did not include any basis for excluding the M/B results aside from the low estimate it produced. [Exc. 843-4]. GHU/CUC's complaint in its Petition for Reconsideration about the RCA choice of the word "accurate" did not change this fact. The RCA is under no obligation to respond to every minor complaint made by a utility in a petition for reconsideration irrespective of its merit.[68] The RCA's error in reciting the word used by GHU/CUC's witness does not render its decision arbitrary, capricious, or unreasonable.

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[68] *See Ship Creek Hydraulic Syndicate v. State, Dept. of Trans. And Public Facilities*, 685 P.2d 715, 718 (Alaska 1984) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971) (abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99) (1977) (stating that due process does not require an agency to explain every decision it makes).

2. The RCA did not act arbitrarily, capriciously, or unreasonably in reaching its risk premium determination.

a. The RCA did not apply the wrong standard of proof.

GHU/CUC persists in its appeal of the RCA's decision to exclude a size specific risk premium in the calculation of the ROE. GHU/CUC argues that the RCA failed to recognize that its size and location in Alaska greatly increases its risk above the risks faced by members of the proxy group analyzed by its expert witness. Brief at 17. GHU/CUC asserts the RCA applied the wrong standard of proof in reaching its risk premium determination. Brief at 17-21. It bases this assertion on the RCA's finding that GHU/CUC "did not present objective or quantitative evidence to demonstrate that [it] face[s] greater risks" than the proxy group of utilities justifying a risk premium of the magnitude proposed." Brief at 37 *citing* [Exc. 0844].

GHU/CUC's argument confuses the concepts of standard of proof and evidence. Whether the preponderance of the evidence, clear and convincing, or beyond a reasonable doubt standard applies to a proceeding, objective or quantitative evidence may be used to meet the applicable standard. The RCA's statement simply points out that GHU/CUC failed to present objective or quantitative evidence to support, by any standard of proof, that GHU/CUC's location in Alaska and small size subject it to greater risk than the other proxy group members.

GHU/CUC counters the RCA's conclusion that the record lacked objective and quantitative evidence that it faces a higher risk than the proxy members by referencing opinion testimony from its expert witness that the proxy group members enjoy risk

mitigating mechanisms not available to GHU/CUC. Brief at 18. It also highlights testimony regarding the inverse relationship between the size of firms and the risks faced. Brief at 19.

GHU/CUC's argument misses the point of the RCA's finding. The RCA did not state that the GHU/CUC failed to provide any objective or quantitative evidence regarding the risk premium issue. It stated that GHU/CUC failed to "present objective or quantitative evidence that it faced *greater* risks, [instead it presented] only *witness opinion* of its relation to the proxy group." [Exec. 0844] (emphasis added). While GHU/CUC's expert expressed the general conclusion that proxy group members enjoy risk mitigating measures not available to GHU/CUC, the RCA noted, "GHU and CUC did not perform any objective risk analysis or comparisons" justifying a 175 point risk premium." *Id.* GHU/CUC fails to identify any evidence in the record that overrides this conclusion. To the contrary, while the record includes evidence that some proxy group members enjoy risk-mitigating measures unavailable to GHU/CUC, GHU/CUC's expert acknowledged that he did not adjust his estimated ROE from the proxy group to account for risks faced by companies in the group that may not be faced by GHU/CUC. [Exc. 735]. The record includes evidence that GHU/CUC has not suffered a plant failure for fourteen years due to its significant efforts to prevent failure by using the best technology, operating prudently, keeping redundant spares, and taking similar measures. [Exc. 1063-1064]. In light of the lack of any analysis in the record demonstrating GHU/CUC faces higher risks relative to the proxy group, the RCA's decision to lower the risk premium included in the ROE was not arbitrary, capricious, or unreasonable.

As it did below, GHU/CUC engages in an ad hoc mathematical rationalization of the 175 basis point premium recommended by its own expert. Brief at 19. GHU/CUC asserts that the "record provides additional objective and quantitative support" for its expert's 175 basis point recommendation and that "[a]ll the necessary inputs" to arrive at a risk premium of 175 basis points existed in the record. Brief at 20. This assertion fails to acknowledge that it, not the RCA, bore the burden of establishing the reasonableness of the premium proposed. The RCA is not required to comb through the record in search of "inputs" that may mathematically support a utility's proposal despite any testimony or evidence using these inputs in the risk premium analysis.[69] It was not arbitrary, capricious, or unreasonable for the RCA to ignore an analysis that did not exist.

GHU/CUC points to the following statement in the RCA's cost of energy adjustment discussion: "between the weather and geography of Fairbanks, we find the uniqueness of serving Fairbanks and North Pole can have meaningful and unavoidable effects on GHU and CUC's cost." Brief at 20 *citing* [Exc. 0804]. GHU/CUC argues this statement "is in direct conflict with the RCA's stated skepticism of the need for an Alaska-specific risk premium." *Id.* This argument conflates the distinct concepts of high costs with high risks. As RAPA's witness explained in his testimony, operating in the harsh climate in Fairbanks can result in higher operating costs. [Exc. 1026]. However, the higher risks posed by the harsh climate in Fairbanks, unlike the catastrophic risks posed by

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[69] It is also worth noting that the mathematical input GHU/CUC expected the RCA to somehow know to apply in a risk premium analysis, beta, is only one measure of risk. *See* [Exc. 965] discussing different measures of risk.

catastrophic weather events, can be mitigated by prudent operating and maintenance measures. [Exc. 1063-1064]. Any proven increase in costs related to these operating and maintenance measures are included in GHU/CUC's revenue requirement as operating expenses. *Id.* Therefore, the RCA's statement regarding unavoidable costs due to serving in Fairbanks and North Pole does not conflict with the RCA's skepticism regarding an Alaska-specific risk premium.

The determination of a just and reasonable ROE involves a highly technical and specialized subject area within the unique purview of the RCA. Courts in other jurisdictions faced with similar records and arguments regarding the necessity of an additional size premium have declined to disturb the public utility commission's determination.[70] Reviewing courts have noted that the applicable standard of review did not include reweighing the evidence and that the court does not "substitute [its] judgment for that of the [regulatory agency] upon a question as to which there is room for a difference of intelligent opinion.[71]

In this case, all of GHU/CUC's arguments regarding the RCA's risk premium determination can be summarized as the position that this Court should reweigh the

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[70] *See Ponderosa Telephone Co., et al. v. California Public Utilities Comm'n*, 36 Cal.App.5th 999 (Cal. Ct. App. 2019) (alteration in original) (rejecting a telephone utility's appeal of the California Public Utilities Commission's denial of a size premium adjustment to the authorized ROE); *see also In re Blue Granite Water Company*, 862 S.E.2d 887 (S.C. 2021) (rejecting a utility's appeal of the South Carolina Public Service's adoption of an ROE that did not incorporate expert recommendations for an additional size premium).

[71] *Ponderosa*, 36 Cal.App.5th at 1024; *Blue Granite*, 862 S.E.2d at 894 (quoting *Parker v. S.C. Pub. Serv. Comm'n*, 314 S.E. 2d 148, 149 (S.C. 1984)).

evidence and reach a different conclusion. The applicable standard of review relevant to the RCA's risk premium determination does not allow this Court to reweigh the evidence. So long as evidence in the record exists to support the RCA's decision, it must be upheld. Evidence in the record supports the RCA's decision that GHU/CUC failed to establish the need for a 175 basis point risk adjustment.

b. The RCA did not Fail to Follow Precedent Regarding Risk Premiums.

GHU/CUC again raises its administrative *stare decisis* argument, this time regarding inclusion of a 175 basis point risk premium. Brief at 21-28. GHU/CUC argues that the 75 basis point premium approved in Order 21 falls below the amount approved in other prior rulings regarding its own ROE, as well as rulings related to other utilities. Brief at 21. GHU/CUC argues that the RCA failed to address its arguments distinguishing the facts and circumstances in its case from a prior ruling involving a different utility whereby the RCA did not approve a risk premium.

As briefed extensively by RAPA before the superior court, each prior ruling GHU/CUC relies on involved entirely different records regarding an appropriate risk premium. RAPA will not repeat its analysis here of each ruling relied on by GHU/CUC. However, a discussion of prior rulings related to GHU/CUC's own authorized risk premiums in the past bears repeating. GHU/CUC's last adjudicated rate case occurred in 2008, twelve years previous to the RCA's decision in this case.[72] GHU/CUC's reliance on

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[72] *See* Docket U-07-076(8)/U-07-077(8); Available at https://rca.alaska.gov/RCAWeb/Dockets/DocketDetails.aspx?id=e44ec217-14eb-42bd-813d-37b5b90d8254.

a risk premium authorized more than twelve years ago ignores the reality that facts relevant to analyzing a utilities' risk profile do not remain static. Financial markets change, operations change, and catastrophic events happen elsewhere. The RCA's determination of an appropriate risk premium does not stand cemented in time as the world changes.

The testimony in this Docket concerning an appropriate risk premium differs from the testimony provided by GHU/CUC in the past. In this case, GHU/CUC's expert witness relied on studies of non-price regulated publicly traded firms and the relationship between higher historical returns and return volatility within the proxy group. [Exc. 924-927]. In Dockets U-07-076/U-07-077, GHU/CUC's expert witness directly compared the variability of GHU/CUC's returns with those of the proxy group members based on audited financial statements and recommended a size premium in the range of 1.76 percent to 3.88 percent.[73] In Order U-07-076(8)/Order U-07-077(8), the RCA did not ultimately rely on this data when it arrived at its 100 basis point risk premium in this prior case. Nonetheless, the RCA considered this data in arriving at its balanced decision regarding an appropriate size premium.

On the other hand, the record in this case includes testimony that GHU/CUC rarely suffers plant failures due to the harsh climate in which it operates. [Exc. 1063]. In other words, a decade-plus of realized experience challenged GHU/CUC's claim regarding the

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[73] *See* Docket U-07-076(8)/U-07-077(8), Prefiled Rebuttal Testimony of Paul R. Moul at 22-25. *See also*, Order U-07-076(8)/U-07-077(8) at 70. Also available at https://rca.alaska.gov/RCAWeb/ViewFile.aspx?id=8939489B-60C0-4605-BD97-D8B2F729F89F.

degree of risk it faces. These differing facts in the record serve as examples of the danger of GHU/CUC's attempt to apply past authorized size premiums as binding precedent that forecloses the RCA's ability to authorize a lower amount in the future.[74]

In this case, GHU/CUC bore the burden of establishing that the risks it faces relative to proxy group members justifies a 175-basis point premium adjustment. The RCA examined the record and found a lack of evidence regarding relative risks between proxy group members and GHU/CUC that would support a 175-basis point adjustment. The RCA was under no obligation to review all of its prior decisions in this area involving entirely different facts and circumstances. Even if the RCA reached a different conclusion in cases involving similar facts and circumstances, as the Supreme Court of South Carolina held in *Blue Granite*, the RCA may reevaluate its previous position in light of the evidence currently before it.[75] Stated otherwise, past RCA decisions based on a different record from the past cannot bind the RCA in the future.

The Second District Appellate Court of Illinois succinctly explained why past commission decisions do not bind it in future dockets:

> [D]ecisions of the commission are not *res judicata*. The concept of public regulation requires that the commission have power to deal freely with each situation that comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding. A record containing

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[74] RAPA does not cite to these differing facts in the record as examples of dispositive facts that controlled the RCA's decision. Instead, RAPA highlights these differing facts as examples of individual facts that represent individual instances of the collection of differing facts in records that, unsurprisingly, results in a different RCA decision regarding the same ratemaking topic.

[75] *Blue Granite*, 862 S.E.2d 887 at 894.

> new evidence or argument that implicates past decisions compels reconsideration on the new record and may require a different result.[76]

The task of authorizing a just and reasonable return on equity does not lend itself to certainty or precision. The RCA bases its ROE decision in each case on the weight of the evidence in the record. Any attempt to bind the RCA to specific components or methodologies for estimating this cost is inconsistent with its duty to base its decision on totality of facts established in the record currently before it. Accordingly, GHU/CUC fails to establish that the RCA acted arbitrarily, capriciously, or unreasonably in arriving in its determination to authorize a lower risk premium than in past cases.

C. The RCA did not act Arbitrarily, Capriciously, or Unreasonably in Rejecting GHU/CUC's Proposed Annualizing and Post-Test Year Adjustments to Plant.

GHU/CUC appeals three different determinations made by the RCA impacting the total rate base included in its revenue requirement. The rate base included in GHU/CUC's revenue requirement, as in most cases, was based on a 13-month average of plant balance.[77] [Exc. 0830]. However, in its revenue requirement filings, GHU/CUC proposed to modify the 13-month average plant balance by treating $1,129,410 of wastewater plant, clarifiers and an influent pump, acquired after the test year had closed as if the items had been in

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[76] *Commonwealth Edison Co. v. Illinois Commerce Com'n*, 937 N.E.2d 685, 705 (Ill. App. Ct. 2010) (citing *A. Finkl & Sons Co. v. Illinois Commerce Comm'n,* 620 N.E.2d 1141, 1146 (Ill. App. Ct. 1993) and *Mississippi River Fuel Corp. v. Illinois Commerce Comm'n,* 116 N.E.2d 394, 396-7 (Ill. App. Ct. 1953)).

[77] *See also* 3 AAC 48.275(a)(9) (requiring a rate base calculation based on using a 13-month average).

service the entire test year. [Exc. 0830]. GHU/CUC also proposed to treat $1,938,588 in wastewater plant consisting of a fine screening system as if it had been in service the entire year. [Exc. 0830]. Lastly, GHU/CUC proposed to treat $1,670,340 of water plant associated with an extension to the Chena Marina placed in service in September of the test year as if it had been in service for the entire year. [Exc. 0830]. The RCA rejected these proposals. [Exc. 0831].

GHU/CUC argues that these plant additions meet the "used and useful" standard under AS 42.05.441(b). Brief at 30. In regard to the post-test year additions, GHU/CUC asserts that there "is no dispute that the sewer treatment plant clarifier and influent pump were used and useful, with known and measurable costs, prior to GHU/CUC filing this rate case." Brief at 30.

GHU/CUC's focus on the "used and useful" standard set forth in AS 42.05.441(b) pretends that relevant law and ratemaking principles require the RCA to allow post-test year plant in rate base so long as it is "used and useful." However, neither AS 42.05.441(b), nor any other relevant statute, regulation, or common law requires the RCA to permit a return on used and useful property acquired after the test year.

To the contrary, in its effort to ensure just and reasonable rates, the RCA strives to adhere to the test year principle and framework.[78] While there are RCA decisions straying

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[78] *See.e.g.*, Order P-08-009(39) at 55 stating, "[i]n our practice, we strictly adhere to utilization of historical test year information. Pro forma adjustments are allowed only sparingly and must be fully supported by testimony filed with the tariff revisions request."

from this principle, these instances are the exception, not the rule.[79] In the current case, the RCA recognized that failing to adhere to the test year principle raises synchronization issues. [Exc. 0824].[80]

Out of concern for the inherent synchronization issues caused by adding late/post test-year to rate base, the RCA balances the approval or disallowance of the pro forma adjustments in light of the benefit of the plant to ratepayers. [Exc. 0829]. GHU/CUC acknowledges this balancing test. Brief at 40. However, once again, GHU/CUC asks this Court to reweigh the evidence in the record. The applicable standard of review does not involve this Court reweighing the evidence. This Court considers whether the RCA's decision was arbitrary, capricious or unreasonable based on the evidence in the record. The RCA's concern for synchronization issues is a rational reason for its decision.

GHU/CUC again raises administrative *stare decisis*, this time regarding the plant additions. Brief at 32. However, the RCA carefully reviewed its prior rulings involving plant additions that fall outside the general test-year principle. These orders include Order U-01-108(26), Order U-08-157(10)/U-08-158(10), Order U-10-029(15), Order U-13-184(22), and Order U-16-066(19). [Exc. 0823-0830]. A review of the RCA's application of these relevant orders to the facts of this case demonstrates it took a "hard look" at the "salient problem[]" and "genuinely engaged in reasoned decision making" and

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79 *Id.*

80 *Citing* Order U-01-108(26) and *Stating* "[w]e explained that issues of synchronization arise when activity occurring subsequent to the test period is considered to establish a revenue requirement and require case-by-case determination."

made a reasonable decision based on the unique record of this particular case.[81] Therefore, there is no basis upon which to disturb the RCA's decision.

Finally, GHU/CUC complains that the disallowance of these plant additions significantly contributes to its under-recovery of its revenue requirement. Brief at 31. However, as addressed, cost-based ratemaking is not designed to ensure recovery of each specific asset currently in rate base or to guarantee a particular return. Every utility subject to regulatory cost-based rate-making experiences regulatory lag. This regulatory lag is not one-sided. Just as utilities will not earn a return on assets added to rate base in between rate cases, ratepayers may pay rates that include depreciation on already retired assets and taxes that outstrip actual income. Ratepayers may pay rates that do not account for recent increases in utility revenues that offset expenses. GHU/CUC did not establish that the disallowance of the relevant plant additions created a risk of financial distress. Without such a showing, its under-recovery does not represent a basis upon which the RCA's decision can be disturbed.

1. Screening System.

GHU/CUC presents three challenges to the RCA's decision to exclude the post-test year addition of the screening system. Brief at 32-37. First, GHU/CUC argues that the RCA's determination that the new screening system represented routine maintenance "is factually wrong and not supported by the record." Brief at 33. Second, GHU/CUC asserts that the RCA failed to follow its prior rulings that consider the financial magnitude of a

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81 *Alpine Energy*, 369 P.3d 245 at 251.

plant addition to the utility. Brief at 34. Lastly, GHU/CUC argues that the RCA erred in basing its determination, in part, on synchronization issues. Brief at 36.

To support its first argument, GHU/CUC argues that the RCA did not address evidence in the record that the screening system did in fact provide benefits to ratepayers beyond that of normal maintenance. Brief at 33-34. GHU/CUC points to the testimony of its witness that GHU/CUC and other wastewater companies have experienced an unfortunate shift in customer behavior to use disposable or flushable wipes threatening serious and catastrophic operational problems. Brief at 33.

A review of the record cited by GHU/CUC concerning this matter reveals testimony that falls short of GHU/CUC's characterization. The record does not contain any evidence concerning customer behavior specifically in Fairbanks or of recent system failures that necessitated the screening system. GHU/CUC acknowledges that the former screens were not at the end of their life. Brief at 33. Without specific evidence of its own customers' behavior, GHU/CUC's claim that the screening system "has led to direct benefits to customers in terms of decreased maintenance costs and improved reliability," remains unsupported. Brief at 34. In light of the lack of such crucial evidence, the RCA's determination that GHU/CUC failed to establish that the new screening system results in ratepayer benefit of the system above and beyond what would occur with normal maintenance cannot be viewed as arbitrary, capricious, or unreasonable.

GHU/CUC next repeats its attempt to apply factually distinguishable rulings involving plant additions to the screening system in an attempt to demonstrate the RCA failed to follow precedent in this area. Specifically, GHU/CUC points to the RCA's

decision in Order U-16-066(19). Brief at 35-36. GHU/CUC concentrates on the proportional impact of the mesh screening system to that of the plant approved in Order U-16-066(19). GHU/CUC argues, "[i]f the cost of expenditure of GHU/CUC's new screening system was several times larger than that of the ENSTAR improvements, which were not considered maintenance based largely on the financial size of the projects compared to gross plant, it is inconsistent for the RCA to determine GHU/CUC's screens were 'routine maintenance.'" Brief at 35-36.

GHU/CUC relies on one factor impacting the RCA's decision in Order U-16-066(19), the proportional magnitude of the plant addition, to the exclusion of all other dispositive factors. The RCA contrasted the evidence in the record regarding the screening system in the present case with ENSTAR's plant additions in Docket U-16-066 whereby the record included evidence of increased safety and reliability. In Order U-16-066(19), the RCA noted undisputed facts that established the additions would lower operating costs.[82] The record in this case lacks the establishment of these facts.

GHU/CUC next argues that the RCA erred in relying on the principle of synchronization in denying the post-test-year screens. GHU/CUC counters the RCA's reliance on synchronization in disallowing the plant additions on two fronts. First, GHU/CUC submits that the RCA cannot include a justification for its decision in an order on reconsideration that it did not articulate in its original order. Brief at 36. This position ignores the fact that the RCA *did* raise the issue of synchronization when discussing

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82 *See* Order U-16-066(19) at 26 discussing how ENSTAR's additions lowered costs.

late/post test-year plant additions. The RCA carefully reviewed its late/post-year plant jurisprudence and the issues of synchronization in the subsection labeled "Jurisprudence" under the general "Plant Additions" section. *See e.g.* [Exc. 0822]. This jurisprudence explains why late or post-test year plant additions threaten synchronization issues. *See e.g.* [Exc. 0827]. To the extent GHU/CUC bases its position on the fact that the RCA did not specifically refer to synchronization in the "Discussion" subsection to the "plant additions" section, it quarrels with the organization of the decision, not its legality.

Setting aside the fact that the RCA did provide justification in its original order, GHU/CUC fails to provide any support for the proposition that an agency cannot support its determination further upon reconsideration.

GHU/CUC next argues that a reasonable basis does not exist for the RCA to rely on synchronization issues because allowing the post-test-year screens in rate base would not likely cause synchronization problems. Brief at 36. Once again, GHU/CUC asks the Court to reweigh the evidence and come to a different conclusion. GHU/CUC points to dissenting Commissioner opinion that the lack of revenues associated with the screens makes synchronization issues unlikely. GHU/CUC oversimplifies the concept of synchronization. The jurisprudence the RCA relied on in this area explains synchronization:

> The proper matching or balance of operating expenses (including depreciation and taxes), rate base, and revenue . . . The expectation is that the relationships from the test period will hold reasonably constant during the period that rates will be in effect. Any change in those relationships could result in the under-recovery or over-recovery of an approved revenue requirement. [Exc. 0827-8].[83]

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83 *Citing* Order U-10-029(15) at 25.

Including the screens may not create a specific synchronization problem between the increase to rate base and revenues associated with the specific addition of the screens. However, it does threaten a more general mismatch elsewhere. The record in this case includes testimony from RAPA's expert that allowing the late/post-test year plant additions to GHU/CUC's thirteen-month average rate base would allow it to "raise rates in the future as it adds plant without reducing rates to recognize additional accumulated depreciation or other plant retirements." [Exc. 972]. As such, GHU/CUC fails to establish that synchronization concerns did not represent a rational basis for disallowing the addition of the screens to rate base.

2. Chena Marina Extension.

GHU/CUC presents two primary arguments regarding the RCA's rejection of its pro forma annualizing adjustment for the Chena Marina extension: 1) the RCA's decision unlawfully discriminates between different segments of GHU/CUC's ratepayers, and 2) the decision conflicts with relevant prior RCA rulings. Brief at 37-8.

GHU/CUC argues that the language addressing the Chena Marina extension in Order 21 draws a distinction between existing and new customers. GHU/CUC suggests that drawing this distinction somehow violates the RCA's obligation to not discriminate in providing service to customers pursuant to AS 42.05.301 and AS 42.05.391. Brief at 38-9. It further asserts that RCA precedent does not support this distinction as a legitimate basis for denying an annualizing adjustment. Brief at 40.

GHU/CUC's arguments surrounding the RCA's decision regarding the Chena Marina extension in rate base ignores the crux of the problem with its proposed annualizing adjustment. GHU/CUC bore the burden of showing that this annualized adjustment represented a just and reasonable exception to the otherwise applicable test year rule. The RCA reviewed its decisions in this area and found that "[i]n all of the relevant cases cited, the adjustment must be for plant primarily built to benefit ratepayers. The Chena Marina was built primarily to serve new customers. Any benefits to the system as a whole were side effects." [Exc. 831]. In other words, each case involving an exception to the otherwise applicable test year rule included a plant investment that benefitted existing ratepayers. This conclusion does not result in any discrimination between new and existing customers. However, this conclusion does point out a dispositive, distinguishable factor in prior cases pertaining to a narrow exception carved from an otherwise applicable rule.

GHU/CUC points to facts in the record that support that the extension increased reliability for the system and filled a needed gap in water service. Brief at 39. However, it fails to identify any evidence in the record that this particular extension of water service offers benefits beyond what would be experienced with any other extension of service. The RCA painstakingly reviewed its decisions in this area and determined that its prior decisions established an exception to the rule only in cases where, in balance, the benefit to ratepayers warranted an adjustment. [Exc. 823-830]. In Order U-08-157(10)/ U-08/158(10), the Order GHU/CUC continues to advance as analogous to this case, the annualized adjustment encompassed the last phase of "a multi-year effort to improve

service reliability" and resulted in an 8.5 percent addition to plant.[84] The RCA carefully considered these differing facts and concluded the plant additions in this case did not warrant a break from the test-year rule. The standard of review that applies in this case does not involve this Court reweighing the evidence and the prior rulings and coming to a different conclusion.

Even if support existed for the position that the RCA misread its prior cases, it was free to establish an improved test for allowing annualizing adjustments so long as its determination was not unreasonable and arbitrary.[85] The determination of whether to allow an annualizing adjustment to a test-year rate base entails a subject area well within the RCA's unique technical purview. It was not unreasonable, arbitrary, or capricious for the RCA to disallow an annualizing adjustment that did not create a benefit for existing customers beyond the benefit realized from any other extension of service.

3. Clarifiers and Influent Pump.

GHU/CUC's arguments related to the disallowance of a post-test year adjustment for the clarifiers and influent pump mirror its arguments related to the annualizing adjustments. It argues that these additions provided benefits to customers for approximately 21 months prior to the issuance of the Commission's order, and were known and measurable at the time of the filing, and will be used and useful at all times the rates determined in this proceeding are in effect. Brief at 41. GHU/CUC asserts that rejecting

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84 Order U-08-157(10)/U-08/158(10) at 26.

85 *Amerada*, 176 P.3d at 679.

these post-test year adjustments "means the utility will forever forego the recovery of and on that portion of investment, and that the rates in effect under Orders 21 and 26 did not reflect the actual plant that was used and useful in providing service to ratepayers in that time period." Brief at 41.

GHU/CUC's arguments in regard to the clarifiers and the influent pump represent nothing more than a repeated complaint regarding the inherent regulatory lag present in every rate case. As previously addressed, GHU/CUC's argument that it "will forever forego the recovery" of this investment ignores the two-sided nature of rate-making. As discussed above, ratepayers likewise "forever forego" the ability to pay reduced rates caused by fluctuating depreciation, tax liabilities, and plant retirements in between rate cases.

Order 21 demonstrates that the RCA carefully applied its rate-making precedent and distinguished the current matter from those cases to arrive at the balanced determination to disallow the annualized and post-test year plant. GHU/CUC fails to demonstrate that the RCA acted arbitrarily, capriciously, or unreasonably in reaching its determination.

D. The RCA's Decision To Disallow A Consumption Adjustment Was Not Arbitrary, Capricious, Or Unreasonable.

GHU/CUC appeals the RCA's disallowance of its pro forma adjustment to revenues to account for declining consumption. GHU/CUC asserts that it established declining consumption by a preponderance of the evidence. GHU/CUC points to the RCA's comment in Order 21 that future adjustments must be "fully support[ed] by data and

testimony." Brief at 43 *citing* [Exc. 813]. It argues that this comment indicates the RCA applied a heightened, incorrect standard of proof in reaching its determination regarding this issue. Brief at 44.

GHU/CUC points to evidence in the record regarding the actual decline in consumption it experienced from the 2018 test year to 2019 and 2020 to support its position. Brief at 45. GHU/CUC acknowledges that its actual consumption amounts in these years does not "line up precisely" with the amounts estimated by its proposed model but argues that they do support the position that the 2018 test year consumption data was not representative of levels going forward. Brief at 42. Thus, GHU/CUC submits, "[e]ven if the RCA did not agree that the predicted results were modeled with a sufficient degree of certainty, the evidence in the record is more than enough to provide for some level of consumption adjustment based on the actual, documented consumption declines observed during the pendency of this proceeding." Brief at 45.

GHU/CUC misunderstands the application of the standard of proof in rate cases before the RCA. In proceedings before the RCA, the utility bears the burden of establishing that its rates are just and reasonable.[86] If the RCA finds a utility's proposed revenue requirement does not result in just and reasonable rates, it must adjust the revenue requirement to ensure the rates meet this standard. Irrespective of the standard of proof applied, a decline in consumption alone does not control whether an adjustment to test year amounts produces just and reasonable rates.

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86 AS 42.05.421(d).

In this case, GHU/CUC bore the burden of demonstrating that the declining consumption adjustment produced just and reasonable rates. The RCA found flaws in GHU/CUC's adjustment. The record includes evidence that GHU/CUC's actual revenues since its last preceding rate case increased, both in total and without cost of energy adjustment revenues or Plant Replacement and Improvement Surcharge Mechanism revenues. [Exc. 975-976]. The purported purpose of GHU/CUC's declining consumption pro forma adjustment is to "normalize" revenues. GHU/CUC failed to establish how this pro forma adjustment normalizes revenues when declining consumption does not associate with a decline in revenues. In light of all of these factors, it was not unreasonable, arbitrary, or capricious for the RCA to reject GHU/CUC's proposed consumption adjustment.

E. The RCA's Decision To Require Escrow Or Interest At 10.5 Percent.

GHU/CUC appeals the RCA's decision to require it to place revenue received from interim rate increases in escrow or agree to pay interest to ratepayers at 10.5 percent. Brief at 48-65. GHU/CUC complains that the RCA provided no explanation or rationale for the requirement to place interim rates in escrow or pay interest at 10.5 percent. Brief at 50-53. GHU/CUC asks the court to remand the RCA's decision regarding escrow or interest and provide guidance regarding what the RCA should consider on remand. Brief at 56. The superior court concluded GHU/CUC waived this point because it did not object before the RCA.

RAPA believes GHU/CUC waived this point on appeal. However, if this Court finds that GHU/CUC did not waive its arguments regarding the RCA's condition to interim rates, and were to remand with instructions, RAPA asks this Court to reject the underlying

premise of GHU/CUC's appeal that the RCA *could not* support this decision with a reasoned explanation and rationale.

GHU/CUC acknowledges that Alaska statute specifically permits the RCA to require interim rates to be placed in escrow pursuant to AS 42.05.421(c). Brief at 50. However, GHU/CUC argues that the RCA lacks explicit legislative authority to require interest on refunds, and under the principle of *unius est exclusio alterius*, the legislature's explicit grant of authority to require escrow without a similar provision for interest, signifies the intent to not authorize interest on refunds. Brief at 54. This argument ignores that the legislature gave the RCA broad power to "do all things necessary or proper to carry out the purposes and exercise the powers granted or reasonably implied[.]"[87]The lack of explicit authority to require interest under AS 42.05.421(c) does not weaken the express broad powers provided elsewhere in legislation.

GHU/CUC goes to great lengths to apply the Superior Court's 2009 decision, *Golden Heart Utilities and College Utilities Corporation v. Regulatory RCA of Alaska ("Golden Heart")*. Appellant's Brief at 58.[88] However, this decision only addressed the RCA's decision to require any refunds to be paid at 10.5 percent interest and did not address permitting the utility to choose between different methods. While RAPA cannot provide an explanation or rationale for the RCA in regard to this issue, it is fair to conclude

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87 AS 42.05.141(a).

88 Citing 2009 WL 2353418 (RCA, 4FA-07-1360CI, June 8, 2009, Decision on Appeal).

that providing a choice between methods presents a flexible solution to accounting for interim rate increase revenues.

In regard to the amount of interest, 10.5 percent, RAPA agrees with GHU/CUC that the RCA did not provide an explanation for this amount. However, the 2009 *Golden Heart* Superior Court decision does not foreclose the possibility of a reasonable explanation for setting the interest rate at the statutory maximum of 10.5 percent, especially in light of the fact that the RCA gave GHU/CUC a choice between paying interest at 10.5 percent or placing the funds in escrow.

RAPA does not agree with the Superior Court's reliance in *Golden Heart* on *Pyramid Printing Co. v. Alaska State Comm'n for Human Rights.*[89] *Pyramid Printing* involved prejudgment and post-judgment interest. The purpose of awarding prejudgment and post-judgment interest differs substantially from the purpose of conditioning interim rates on the payment of interest should refunds later be required. Prejudgment and post-judgement interest aims to "fairly compensate the successful claimant for the lost use of money between the date he or she was entitled to receive it and the date of judgment." Whereas, requiring interest on refunds protects ratepayers from excessive and unsupported interim rates prior to the conclusion of a full investigation.

GHU/CUC also takes the position that the RCA erred in requiring interest for the "entirety of the time that interim rates are in place" as opposed to once the final rates were determined. It cites to AS 45.45.010(a) stating that the interest rate is "10.5 percent a year

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89 153 P.3d 994 (Alaska 2007).

and no more *after* it is due." Brief at 61 (emphasis added). This position conflicts with this Court's application of AS 45.45.010(a) in other cases whereby the Court has applied interest as of the time additional compensation, or the cause of action, accrued.[90] Analogously, interest accrued to GHU/CUC's ratepayers at the time they began to overpay rates - rates subsequently found unjust and unreasonable.

In conclusion, RAPA urges the court to refrain from issuing a decision or instructions that forecloses the RCA's ability to apply its independent judgment to the issue of how to best safeguard ratepayers from the risks of interim rate increases.

V. CONCLUSION

For all the reasons discussed herein, RAPA respectfully requests that the Court affirm the Superior Court's order in all regards.

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[90] *See. e.g. Houston Contracting, Inc. v. Phillips*, 812 P.2d 598, 602 (Alaska 1991) (holding that interest was due as of the time additional compensation became due as opposed to the date the employer received notice of the claimant's request for increased benefits); *see also State v. Phillips*, 470 P.2d 266, 273 (Alaska 1970) (holding that interest became due as of the time of wrongful death as opposed to at the time the court rendered a judgment).

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

GOLDEN HEART UTILITIES, INC. and COLLEGE UTILITIES CORPORATION, Appellants, v. REGULATORY COMMISSION OF ALASKA, OFFICE OF THE ATTORNEY GENERAL REGULATORY AFFAIRS & PUBLIC ADVOCACY SECTION; FOUNTAINHEAD DEVELOPMENT, INC.; GREATER FAIRBANKS COMMUNITY HOSPITAL FOUNDATION, INC.; FOUNDATION HEALTH, LLC; JL PROPERTIES, INC.; TIMMONS & LARSON, INC.; MV INVESTMENTS LLC; ALASKA EXPRESSO DISTRIBUTORS LLC, D/B/A SUNRISE BAGEL & ESPRESSO; PACIFIC RIM ASSOCIATES I, INC., D/B/A CLARION HOTEL & SUITES; H2O 2U LLC D/B/A WATER WAGON; and UNIVERSITY OF ALASKA FAIRBANKS, Appellees.	Supreme Court No. S-18624

Trial Court Case No. 3AN-21-06152 CI
RCA Docket Nos. U-19-070/-071, U-19-087/-088

CERTIFICATE OF SERVICE AND TYPEFACE

I certify that on October 26, 2023, true and correct bound copies of the Office of the Attorney General, Regulatory Affairs & Public Advocacy Section's **Brief of Appellee State of Alaska Department of Law Regulatory Affairs and Public**

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